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No. 80-203

In the Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
PETITIONER
v.
J. J. CURRAN AND JACQUELYN L. CURRAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE COMMODITY FUTURES TRADING COMMISSION AS AMICUS CURIAE

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On January 23, 1981, the Commission filed a brief amicus curiae urging the Court to grant this petition in order to resolve a conflict in the circuits concerning the availability of a private right of action to remedy violations of Section 4b of the Commodity Exchange Act, 7 U.S.C. 6b. On February 23, 1981, the Court granted and consolidated three petitions for a writ of certiorari (Nos. 80-757, 80-895 and 80-936) filed from the Second Circuit's decision in *Leist* v. *Simplot*, 638 F. 2d 283 (1980). In *Leist*, the court of appeals held that a private action for damages may be brought to remedy violations of Sections 4a, 4b, 5(d), 5a(8) and 9(b) of the Act, 7 U.S.C. 6a, 6b, 7(d), 7a(8) and (Supp. III) 13(b). The Commission agrees with this holding and

intends to file a brief in support of this position. The Commission is filing this supplemental memorandum, however, in order to bring to the Court's attention an important factual aspect of *Leist* that may warrant granting the instant petition as well.

Section 4b of the Act makes it unlawful "for any person, in or in connection with any order to make, or the making of, any [commodity futures] contract * * * for or on behalf of any other person * * * (A) to cheat or defraud * * * such other person." 7 U.S.C. 6b(A). Although the precise scope of the coverage of this section has not been settled by the courts (compare *Leist* v. *Simplot, supra*, 638 F. 2d at 322-323, with *id.* at 331-332 (Mansfield, J., dissenting)), it is the Commission's view that Section 4b is violated only if the party committing the alleged fraud was acting "for or on behalf of" the defrauded party. Thus, a principal-agent or fiduciary relationship, such as between a customer and his broker, is a necessary element of a violation of Section 4b. See *Gordon* v. *Shearson Hayden Stone Inc.*, 2 Comm. Fut. L. Rep. (CCH) para. 21,016, at 23,976, 23,980-23,981 (CFTC Apr. 10, 1980), appeal pending, No. 80-7212 (9th Cir.).

The primary allegation of a violation of Section 4b in *Leist* is that the defendant futures commission merchants conspired with their customers to accumulate substantial "short" positions and thereby to depress and manipulate prices on the potato futures market. This conduct, it is alleged, resulted in financial injury to the plaintiff traders who were on the opposite, or "long," side of the market. See *Leist* v. *Simplot, supra*, 638 F. 2d at 289-293. Thus, the alleged violation of Section 4b is the defrauding of the plaintiff "long" traders by the actions of the defendant "short" traders. This allegation does not involve a breach of fiduciary duty; the defendants were not acting "for or on

behalf of" the plaintiffs. See 638 F. 2d at 331-332 (Mansfield, J., dissenting). Hence, in the Commission's view, the complaint in *Leist* does not allege a violation of Section 4b of the Act.[1]

The petition in the instant case, in contrast to *Leist*, does present the question whether a private action may be brought by a commodity futures customer who is defrauded by his broker in violation of Section 4b. Both the majority (638 F. 2d at 286 n.1) and the dissent (638 F. 2d at 342) in *Leist* recognized this important difference between the two cases. Moreover, as the court noted in *Leist* (638 F. 2d at 300), most of the private suits alleging violations of Section 4b have involved claims of fraud committed by brokers upon their customers. Indeed, the decisions of the Fifth Circuit that are in conflict with this case and *Leist* on the availability of a private right of action under Section 4b both involved suits brought by customers against their brokers. *Fischer* v. *Rosenthal & Co.*, No. 80-1056 (5th Cir. Feb. 20, 1981); *Rivers* v. *Rosenthal & Co.*, 634 F. 2d 774 (5th Cir. 1980), petition for cert. pending, No. 80-1542 (filed Mar. 10, 1981).

Thus, the most significant and recurring question in this area is the availability to a defrauded customer of a private right of action against his broker under Section 4b.[2] But this question will not necessarily be resolved by the Court's decision in *Leist* because of the unusual context in which the

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[1]The complaint, however, does appear to state a violation of Section 9(b) of the Act, 7 U.S.C. (Supp. III) 13(b), the anti-manipulation provision.

[2]The Fifth Circuit and the Ninth Circuit have deferred consideration of pending cases raising this question while awaiting the Court's decision in *Leist*. *Fischer* v. *Rosenthal & Co.*, *supra* (motion for extension of time to file petition for rehearing and stay of issuance of mandate granted Mar. 23, 1981); *Kotz & Kolar, Inc.* v. *Bache Halsey Stuart, Inc.*, No. 79-3442 (9th Cir., argued Oct. 14, 1980) (submission ordered withdrawn pending this Court's decision in *Leist* Mar. 19, 1981).

Section 4b question arises in that case.[3] Accordingly, the Court may wish to grant the instant petition, limited to Question 1, in order to consider the availability of a private right of action under Section 4b in a case involving an allegation of fraud by a broker against his customer.

Respectfully submitted.

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[3]As this Court has recognized, the availability of an implied private right of action may depend upon the identity of the plaintiff. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730-732 (1975). One of the factors relevant to the inquiry is whether the plaintiff is a member of the class for whose especial benefit the statute was enacted. *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). Thus, in light of the focus of Section 4b on protecting against frauds committed by persons acting "for or on behalf of" other persons, a ruling that the traders in *Leist* may not maintain a private action under Section 4b would not necessarily imply that customers defrauded by their brokers may not bring such an action. Along these lines, Judge Mansfield's dissenting opinion in *Leist* indicates that he did not consider his view necessarily to be inconsistent with the Sixth Circuit's holding in this case. 638 F. 2d at 342.